

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LISA RUSS,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
EDUCATION, KEVIN W. RUSS, an
individual; and GREAT LAKES HIGHER
EDUCATION CORPORATION AND
AFFILIATES,

Defendants.

8:17CV198

ORDER

This matter is before the Court *sua sponte* pursuant to [Federal Rule of Civil Procedure 4\(m\)](#), and on Plaintiff's Motion for Leave to File Out of Time and Instante ([Filing No. 37](#)).

Plaintiff commenced this action against the above-named defendants on June 7, 2017. ([Filing No. 1](#)). On August 22, 2017, Plaintiff filed a Motion to Amend the Complaint ([Filing No. 26](#)) and attached a copy of the proposed Amended Complaint ([Filing No. 26-1](#)) to the motion. Pursuant to the parties' Joint Stipulation ([Filing No. 28](#)), the Court granted Plaintiff's Motion to Amend by text order dated September 11, 2017. (Filing No. 29). In the text order, the Court ordered that "Plaintiff shall file her Amended Complaint by September 15, 2017." The text order also memorialized the parties' stipulated responsive pleading deadline of October 13, 2017, for Defendants Great Lakes and the United States Department of Education.

This district's local rules provides, "The granting of the motion for leave to amend does not constitute filing the amended pleading. If granted leave to amend, the party must then file the amended pleading." NECivR [15.1\(c\)](#). Despite the Court's text order and despite this district's local rule, Plaintiff believed the Amended Complaint was filed instante and did not actually file the proposed Amended Complaint or this motion until October 13, 2017. ([Filing No. 37](#); [Filing No. 38](#)). Nevertheless, in the interest of justice, the Court will grant Plaintiff's motion and deem the Amended Complaint filed on August 22, 2017. The parties have proceeded in this action as if Plaintiff actually filed the Amended Complaint on August 22, 2017, as Defendants Great Lakes and the Department of Education both filed responsive pleadings to the Amended Complaint on October 13, 2017. (Filing Nos. 31, 33, 36). The Amended Complaint attached to Plaintiff's Motion requesting leave to amend is identical to the Amended Complaint filed on October 13,

2017. ([Filing No. 26-1](#); [Filing No. 38](#)) The active parties all apparently have been treating the Amended Complaint as the operative pleading, so granting Plaintiff's motion will cause the docket to reflect the pleadings upon which the parties are proceeding. ([Filing No. 37](#)). Accordingly, the Court finds Plaintiff's motion should be granted and will deem the Amended Complaint ([Filing No. 38](#)) filed on August 22, 2017. See *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016)(quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962))("[A] district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'").

Plaintiff commenced this action against the above named-defendants more than 90 days ago, on June 7, 2017. [Fed. R. Civ. P. 4\(m\)](#) provides, "If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time." [Fed. R. Civ. P. 4\(m\)](#). On July 27, 2017, summons was returned unexecuted against Defendant Kevin Russ. ([Filing No. 21](#)). The record reflects Plaintiff has not filed any return of service indicating service on Defendant Kevin Russ, nor has Defendant Russ entered a voluntary appearance. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Leave to File Out of Time and Instantly ([Filing No. 37](#)) is granted. Plaintiff's Amended Complaint ([Filing No. 38](#)) is the operative pleading and shall be deemed filed on August 22, 2017.

2. Plaintiff shall have until **October 31, 2017**, to show cause why this case should not be dismissed against Defendant Kevin Russ pursuant to [Federal Rule of Civil Procedure 4\(m\)](#) or for want of prosecution. The failure to timely comply with this order may result in dismissal of this action against Defendant Kevin Russ without further notice.

Dated this 17th day of October, 2017.

BY THE COURT:

s/ Michael D. Nelson
United States Magistrate Judge